ute and have frequently concluded from such an examination that Congress only intended to provide immunity for certain testimony in certain types of antitrust proceedings. See *United States v. Standard Sanitary Mfg. Co.* (E.D. Pa. 1911), 187 Fed. 232; *H. Wagner & Adler Co. v. Mali* (2d Cir. 1935), 74 F. 2d 666; *United States v. Welden, supra.* The Government apparently acknowledges in the second paragraph of its argument that the Immunity Statute does not apply to all proceedings under the antitrust laws. The Government says that immunity "appears" to be confined "to testimony given in suits by the Government." (Br. 6) The question of the applicability of the Immunity Statute to Section 4A proceedings cannot be resolved by a simplistic reading of the wrong statute. Therefore, the first paragraph of the Government's Argument should be disregarded.

2. The Court of Appeals Did Decide That Private Damage Actions Are Covered by the Immunity Statute.

The Court of Appeals concluded that immunity extends to enforcement proceedings. (Pet. App. 13-14.) Then it said: "Our holding is based on the conclusion that a civil antitrust damage action constitutes enforcement of the antitrust laws and is a 'proceeding' or 'suit' within the meaning of 15 U.S.C. § 32." (Pet. App. 14-15.) Then it reasoned that as private actions are enforcement proceedings, Government damage actions are also enforcement proceedings. (Pet. App. 15.)

If a court has determined a question of law and its determination of that question is essential to its decision in the case before it, it must be concluded that that court has decided that question of law. If the decision stands, the above holding will be used and relied upon in every private damage suit brought throughout the nation. This holding of the Court of Appeals for the Ninth Circuit is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *H. Wagner & Adler Co. v. Mali, supra.*

3. The Government Ignores the Immunity Problems Created by Cross-Examination and by the Joinder of False Claims Act and Clayton Act Claims.

The Government ignores two important facts: First, the case against Carnation and Inland has not yet been tried and no one can now tell whether the evidence as to the False Claims Act claim will completely overlap the evidence as to the Section 4A claim. If the answers pertain only to the Government's claim under the False Claims, Rutherford does not have immunity. Second, Rutherford has been ordered to answer questions put by Inland's counsel and it is apparent from the questions that Inland seeks to prove that Rutherford committed perjury before the grand jury. (Pet. 7.) If Rutherford answers questions put by Inland's counsel, he may not have immunity under the Immunity Statute. The Government ignores Rutherford's dilemma, but he cannot ignore it. He will go to

jail if he does not answer the questions; he may go to jail if he does answer them.

4. The Government Has Misstated the Constitutional Question.

The Government incorrectly assumes that Rutherford is challenging the validity of the Antitrust Immunity Statute. (Br. 2.) Rutherford is not contesting the power of Congress to grant immunity in exchange for testimony. Rutherford is contesting the court's power to compel testimony from a witness who is unwilling to accept that bargain. Rutherford contends that such compulsion fails to protect his Fifth Amendment right to preserve his dignity and privacy, a right which this Court recognized in *Tehan v. Shott* (1966), 382 U.S. 406, 15 L. Ed. 2d 453, and *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694.

Respectfully submitted,

JOSEPH A. BALL,
Counsel for Petitioner.

R. MAX ETTER,
Of Counsel.